RECORD AND BRIEFS

No. 10-1491

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In The

Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* VICTIMS OF THE HUNGARIAN HOLOCAUST IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTERESTS OF *AMICI CURIAE*

From April to December 1944, some 500,000 Hungarian Jews, their assets frozen and held in various banks, were transported by rail to Auschwitz and other concentration camps.[1] [2] To this date, these assets have not been returned nor has any compensation been paid for the taking. Class actions are now pending in the Seventh Circuit Court of Appeals on behalf of the victims and their heirs.[3] This Court's decision herein may directly impact these claims. This *amici*, answering the question posed by the Court, is offered to vindicate the principle of universal jurisdiction for universally condemned violations of international law. This principle was enunciated by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amici* briefs.

[2] This figure of 500,000 is the official total of killed Hungarian Jews as given by the Ministry of Foreign Affairs of the Republic of Hungary, Press Release, 11 April 1997, at http://www.un.int.hungary/970411kp.htm

[3] *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, et al.*, No. 11-2386 (7th Cir. 2011); *Victims of the Hungarian Holocaust v. Hungarian State Railways*, No. 11-2791 (7th Cir. 2011).

SUMMARY OF ARGUMENT

Sosa, involving the conduct of foreign citizens on foreign soil, held the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, applicable under very limited circumstances. In doing so, *Sosa* itself holds the answer to the question posed herein.

Application of the ATS to conduct outside the United States is restricted to those circumstances involving universally condemned violations of international law: "a handful of heinous actions – each of which violates definable, universal and obligatory norms." (*Sosa*, 542 U.S. at 732). These include genocide, torture and crimes against humanity. For purposes of civil liability, perpetrators, like the pirate and slave trader of the 18th Century, have become *hostis humani generis*, an enemy of all mankind. Therefore customary international law not only allows, but requires that jurisdiction be asserted wherever such perpetrators are found.

No presumption against extraterritoriality applies under these circumstances. The purpose of the presumption is to limit conflicts between U.S. and foreign law by limiting the application of U.S. substantive law on foreign soil. However, the ATS does not seek to apply U.S. substantive law. As this Court in *Sosa* noted, the ATS applies only a narrow band of international law that is universally recognized. As such, the ATS is not subject to the presumption

against extraterritoriality. It cannot bring U.S. law into conflict with foreign law because it does not apply U.S. law. The presumption of extraterritoriality asserted in *Morrison v. National Bank of Australia*, 130 S.Ct. 2869 (2010) is therefore irrelevant.

ARGUMENT

I. *Sosa v. Alvarez*

The answer to the question herein is found in the majority and concurring (J. Breyer) opinions in *Sosa*. In establishing the norm of conduct covered by the statute (universally condemned violations of international law), *Sosa* also established the ATS' territorial reach (universal jurisdiction). The latter is explained in Justice Breyer's concurrence. Both the majority and concurring opinions emphasized the cautious and restricted nature of the Court's application of the statute.

A. The Majority Opinion

After stressing the need for judicial caution in implementing the jurisdiction conferred by the statute, Justice Souter concluded:

> "[. . .] we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when

> § 1350 was enacted [. . .] This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who have faced the issue before it reached this Court [. . .] suggesting that the limits of § 1350's reach be defined by "a handful of heinous actions – each of which violates definable, universal and obligatory norms" [and that] "Actionable violations of international law must be of a norm that is specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. at 732 (2004) (citations omitted).

The Court suggested torture and genocide by private actors as examples of the very narrow band of universally condemned conduct that might be actionable under the ATS. *Sosa*, 542 U.S. at 732 fn. 20.

B. The Concurring Opinion

With the Court's opinion as his premise, Justice Breyer addressed the territorial reach of the statute where the alleged wrongful acts occurred outside the United States. He recognized that foreign relations concerns "do arise however when foreign persons bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm." *Sosa*, 542 U.S. at 761. He concluded that the doctrine of universal jurisdiction should apply to the narrow band of universally condemned conduct actionable under the ATS:

> Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that **universal jurisdiction** exists to prosecute a subset of that behavior [. . .] That subset includes torture, genocide, crimes against humanity, and war crimes [. . .] The fact that this procedural consensus exists suggests that recognition of **universal jurisdiction** in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. *Sosa*, 542 U.S. at 762 (2004) (internal citations omitted) (emphasis added).

C. Conclusion

In accord with the majority and concurring opinions in *Sosa*, *amici* respectfully suggest that as to those violations of international law actionable under the ATS, e.g., genocide, torture, and crimes against humanity, the doctrine of universal jurisdiction should apply and that any perpetrators should be

subject to the jurisdiction of the courts wherever they are found.[4]

II. The Presumption Against Extraterritoriality Does Not Apply To The Alien Tort Statute.

The presumption against extraterritoriality exists "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

According to Justice Holmes, the presumption was necessary because "[f]or another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations[.]" *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

The presumption against extraterritoriality was then to be applied to statutes declaring U.S. substantive law. The presumption is used to minimize

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[4] Petitioners and other *amici* have additionally argued that an extraterritorial application of the ATS is supported by the language and history of the statute. See ***Petitioners' Supplemental Opening Brief; Brief Of Amici Curiae International Law Scholars In Support Of Petitioners***.

conflict of laws between nations, and to avoid offending international comity. The ATS, however, does not apply U.S. substantive law, but rather universally recognized international law. (Part I above). As such law is, by its definition, universal, there is no conflict of laws, as universally recognized international law must be recognized, applied and enforced in a like manner by all responsible members of the community of nations. The presumption of extraterritoriality held to apply in *Morrison v. National Bank of Australia* is therefore irrelevant.[5]

CONCLUSION

Amici Victims of the Hungarian Holocaust, respectfully suggest that the Alien Tort Statute, 28 U.S.C. § 1350, "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States" when the conduct giving rise to the cause of action constitutes genocide or a crime

[5] Petitioners and other *amici* have additionally argued that any effort to apply the presumption of extraterritoriality would be overcome by the language and history of the statute. See ***Petitioners' Supplemental Opening Brief; Brief Of Amici Curiae International Law Scholars In Support Of Petitioners***.

against humanity rendering the perpetrator an enemy of mankind.

Respectfully submitted,

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